IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-615

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, ET AL.,

Petitioners,

v.

FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

(1) Article VI, §2 of the Ohio Constitution (1851) which reads as follows:

> "The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State;"

(2) Article I, §2 of the Ohio Constitution (1851) which reads in pertinent part as follows:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit. . . . ;"

(3) Ohio Revised Code §2505.31 which reads as follows:

> "In a civil case or proceeding, except when its jurisdiction is original, and except as provided by section 2309.59 of the Revised Code, the supreme court need not determine as to the weight of the evidence."

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QUESTION PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI

The petition for writ of certiorari filed in this case presents the following question:

> Whether or not the "findings of fact" made by the trial court below were indeed factual determinations or were instead conclusions of law (or mixed fact and law); and, if they were factual determinations, whether the Ohio Supreme Court made contrary determinations; and, if so, whether such contrary determinations were inappropriately made under Ohio law so as to violate certain Fourteenth Amendment rights of the Petitioners.

I. INTRODUCTION AND STATEMENT OF THE CASE

This case below involved a challenge to the Ohio system for financing public elementary and secondary education. That challenge was based solely upon *state* constitutional grounds. Plaintiffs (Petitioners) did not allege that the system violated any federal constitutional provisions, and the only issues heard and decided by the trial court, by the appellate court, and by the Ohio Supreme Court related to the validity of the Ohio school finance system under Article I, §2 and Article VI, §2 of the Ohio Constitution.

It was only after Petitioners lost on the merits of their state constitutional challenges that they attempted to interject any federal claim into this lawsuit. This continued litigation is desirable from the Petitioners' standpoint, not because they truly seek a definitive answer to valid claims, but because the very existence of this suit supposedly gives them a lobbying tool for use in trying to coerce the Ohio General Assembly into appropriating more funds for the Cincinnati School District.

After a lengthy trial regarding the state constitutional challenges, the trial court adopted *in toto* Petitioners' proposed findings of fact and conclusions of law. Of principal importance were two general findings made by the trial court.

First, the trial court found that differences among school districts' revenue levels could be partially explained by variations in the amount of taxable property wealth among districts and by variations in the tax rates voluntarily imposed by the citizens of local districts upon themselves. Petitioners' App., pp. 267a-318a. This, the trial court concluded, constituted a violation of the "equal protection and benefit" clause found in Article I, §2 of the Ohio Constitution. Petitioners' App., pp. 404a-416a.

Second, the trial court focused on the "quality" of education. Based upon the subjective opinions of a few witnesses, the trial court concluded that the qualitative level of education in Ohio did not measure up to what the trial court felt to be "high quality" education. The trial court opined that a minimum of $1700 per pupil would be needed to provide its version of "high quality" education. Petitioners' App., pp. 352a-374a. Since the Ohio finance system was not designed to provide the $1700 per pupil

figure found appropriate by the trial court, the court concluded that the system also contravened the "thorough and efficient" clause of Article VI, §2 of the Ohio Constitution. Petitioners' App., pp. 393a-404a.

Defendants (Respondents) appealed the trial court's decision to the court of appeals. That appellate court upheld the trial court's equal protection and benefit clause holding, but reversed the thorough and efficient clause decision. The court of appeals recognized that, under the provisions of the Ohio Constitution, it was not within the prerogative of the trial court to substitute its judgment as to what comprised a "high quality" education for that of the Ohio General Assembly. In this respect, the court of appeals stated:

> We find ourselves favorably impressed by the thrust of the third assignment, challenging as it does, interference by the judicial department with the legislative, and conclude that the assignment is well taken. The court below erred and overstepped its power in deciding that the finance system for public schools adopted by the General Assembly represents an "abdication" by the Assembly of its duty under Article VI, §2 of the Ohio Constitution. Although exceptions have been judicially recognized, the general rule of noninterference enjoys widespread acceptance; that is, the courts have no power to enforce the mandates of the constitution which are directed at the legislative branch of the government or to control the work of the lawmakers.... That courts have no power to substitute their judgment for that of the legislature is axiomatic....[T]he sovereign people of the State of Ohio have unequivocally indicated—through their constitution—the department of government (the legislative) which is to have the responsibility for the state's public school system....We do not have here a situation in which the General Assembly has failed to act; it is obvious from the number of statutes involved in the instant appeal, and otherwise, that the legislature has acted and passed laws which presumably in its discretion provide a "thorough and efficient system" of schools. 10 Ohio Op. 3rd at 32-33 (Petitioners' App., pp. 68a-69a).

Although Petitioners flatly state in their brief that the Court of Appeals "affirmed and adopted all of the trial court's findings of fact" (Brief of Petitioners, p. 6), that is most certainly not the case. Despite the fact that the validity of the trial court's findings had indeed been challenged by the Defendants, the Court of Appeals did not deal directly with this issue. However, it did state that the trial court's conclusions—in the area of equal protection—were supported by the record, but the Court of Appeals *expressly limited* this holding to those conclusions which related to the equal protection issue (Article I, §2 of the Ohio Constitution). 10 Ohio Op. 3rd at 36 (Petitioners' App., p. 75a). The Court of Appeals made no determination at all that those subjective findings and conclusions which were related to the quality of education and the "thorough and efficient" clause were supported by the record. Instead, the Court of Appeals discounted those findings when it held that the Ohio system did not violate Article VI, §2 of the Constitution.[1]

Defendants (Respondents) appealed to the Supreme Court of Ohio on the state equal protection issue (Article I, §2), and Petitioners cross-appealed on the thorough and efficient clause issue (Article VI, §2). The Supreme Court affirmed the Court of Appeals insofar as it had held that the school finance system did not violate Article VI, §2. The Supreme Court quoted with approval portions of the opinion of the Court of Appeals in this area, and reiterated what has long been established law in Ohio: in matters of education and school finance, the General Assembly is entitled to great deference from the judiciary. 58 Ohio St. 2d at 385-386 (Petitioners' App., p. 46a).

On the equal protection issue, however, the Supreme Court reversed both the Court of Common Pleas and the Court of Appeals. Like those two lower courts, the Supreme Court expressly recognized the fact that local school district revenues were affected to a certain degree by variations in local property wealth and voter-approved tax rates. 58 Ohio St. 2d at 376-377 (Petitioners' App., p. 37a). Unlike the lower courts, though, the Supreme Court held *as a matter of law* that differences in school

1 Although the Court of Appeals purposefully refused to affirm the findings and conclusions of the trial court in this area, at no time in the Supreme Court of Ohio did the Petitioners claim that the Court of Appeals erred in this regard or that the action of the Court of Appeals violated their federal due process or equal protection rights.

district revenues due to variations in local property tax bases and voter-approved rates did not constitute a violation of the Ohio equal protection and benefit clause. 58 Ohio St. 2d at 377-382 (Petitioners' App., pp. 37a-42a). That legal conclusion should not have surprised anyone, for it is the very conclusion reached in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), a case in which this Court dealt with a federal equal protection challenge to a state school finance system.

The Petitioners then sought, by a motion for rehearing, to have the Ohio Supreme Court reverse itself. That motion was denied.

Having failed to prevail on their state claims in the state courts, Petitioners have now turned to this Court, contending that they lost their case because of some alleged irregularity in the appellate review process. They are wrong. Plaintiffs were unsuccessful simply because the established law did not support their position. While the trial court chose not to follow that law, the Supreme Court of Ohio was obligated to apply the law, and that is precisely (and only) what the Supreme Court did. Furthermore, the petitioners failed in their efforts to have the Ohio Supreme court reverse itself because they misunderstood the reasoning employed by the Ohio Supreme Court and the Petitioners were (and remain) wrong in their view of the reviewing powers and authority of the Ohio Supreme Court—all of which is explained hereafter.

Accordingly, the pending petition for certiorari has no merit, and Respondents hereby request that the petition be dismissed and that Respondents be awarded their costs in opposing the petition.

II. ARGUMENT

A. INTRODUCTORY SUMMARY OF ARGUMENT

As is discussed and demonstrated hereafter, the Petitioners' position on the actions taken by the Ohio Supreme Court is pure fabrication. They complain that findings contrary to those of the trial court were improperly made, but Petitioners' arguments and credibility are lost when one appreciates the fact that their description of the Ohio Supreme Court's decision is solely based upon an inaccurate, piecemeal and out-of-context presentation

of that decision. Beyond that, they have misstated Ohio law respecting the reviewing powers of the Ohio Supreme Court and have misconstrued notions of Fourteenth Amendment rights in an effort to somehow raise enough issues to keep this litigation alive. Simply stated, the Petitioners are wrong, and the petition should be dismissed.

B. CONTRARY TO PETITIONERS' ASSERTIONS, THE SUPREME COURT OF OHIO DID NOT MAKE A SINGLE STATEMENT OF FACT WHICH IN ANY WAY CONFLICTS WITH THE TRIAL COURT'S FINDINGS OF FACT

1. *The "Equal Protection" Facts*

The Petitioners' basic premise, that the Ohio Supreme Court formulated statements of fact at odds with the trial court's findings, is wrong and cannot withstand close analysis.[2]

2 The discussion contained in Respondents' Argument squarely addresses the Petitioners on their own grounds; that is, upon the assumption that what they submitted to the trial court as proposed "findings" can be accurately and properly characterized as *factual* determinations drawn from the evidence of record. In that fashion the discussion in this brief proceeds without noting that what the Petitioners present as trial court findings of fact are, as often as not, *conclusions* of law or mixed conclusions of fact and law. The Respondents do, however, challenge the merits of the pending petition on the ground that the trial court's "findings" (as are involved in the petition) are not *factual* determinations at all but are, instead, conclusions of the sort that are appropriate for appellate review even in the most routine cases. While there are numerous examples to demonstrate the mislabeling of legal conclusions as "findings," an appropriate example is found in the conclusion to Petitioners' Brief at p. 23. There the Petitioners cite—as a trial court finding of fact—a statement that draws *conclusions* respecting at least two legal issues which were litigated below:

> [T]he school districts in this state generally fall short of having sufficient resources to provide a satisfactory level of education to the overwhelming majority of Ohio's school children.

This the Petitioners represent as a finding of fact so cut and dry as to parallel a factual determination as to the speed of an automobile in an automobile accident case. In this regard the Respondents respectfully point out that the amount of resources which would be "sufficient" and the level of education which would be "satisfactory" were issues of *law* that existed in the case from start to finish. It is apparent from a reading of the Ohio Supreme Court's decision that the high state court took an entirely different analytic position with respect to the sufficiency and the satisfactory levels of resources and educational services than the Petitioners take. Those were dealt with as matters of law, with the Ohio Supreme Court concluding that such matters had been adequately addressed by the Ohio General Assembly in its establishing of a "thorough and efficient" system of common schools. That legal conclusion was based upon the rationale that the revenue generating mechanisms were a reasonable approach, given Ohio's historic concern with retaining local control, and that it was up to the Ohio Legislature to properly define a satisfactory level of educational services and supply what it determines to be "sufficient" revenues.

In seeking to bolster their contention that the Supreme Court advanced controlling statements of fact which conflict with the trial court's findings, Petitioners pinpoint some specific areas where, they insist, this occurred. In making their examples (starting at page 9 of their Brief), Petitioners first isolate two statements made by the Supreme Court in its decision:

> *The number of dollars* guaranteed per pupil at the 20 mill level *has been determined by the Educational Review Committee to be sufficient* to assure that all school districts are given the means to comply with the State Board of Education Minimum Standards, which describe a program of "high quality" pursuant to R.C. 3301.07(D). 58 Ohio St. 2d at 382 (Petitioners' App., p. 42a) (emphasis added).
>
> *The "Equal Yield Formula"* [*Ohio's school finance formula*] *attempts to establish a funding floor, at 20 mills, that is sufficient* to assure that each school district has the means to comply with state minimum standards. 58 Ohio St. 2d at 388 (Petitioners' App., pp. 48a-49a) (emphasis added).

After setting forth these statements, Petitioners then quote various findings of the trial court which they claim directly contradict those statements. Such is not the case, however.

Those findings reproduced in Petitioners' Brief at pages 9-10 deal generally with technical violations of the state minimum standards. Nowhere, though, is there any finding that violations occur *because* Ohio's schools do not have sufficient funds to comply with the standards. Indeed, such a finding would have been impossible to make or support. The uncontroverted evidence proves that the Ohio system does allot enough dollars so that districts can provide a high quality education in accordance with state standards. Even though schools sometimes may not

comply with each and every one of the hundreds of standards, that non-compliance is because of *non-fiscal* reasons. Thus, in this area, not a single word of the Supreme Court's decision is in any way contradicted by the trial court's findings. That Court correctly noted in its opinion (and plaintiffs have never denied) that the Ohio General Assembly, through its Education Review Committee, did initially determine the number of dollars to be sufficient to meet the standards, and that the Equal Yield Formula does attempt to establish a funding floor sufficient for that purpose.

Petitioners next focus upon the Supreme Court's discussion of the property tax component of the Equal Yield Formula. Petitioners' Brief, pp. 10-12. First, they claim that the Supreme Court's statement to the effect that the formula's "objective is to equalize the property wealth base" of school districts is in conflict with the findings. Their allegation is nonsense. The Supreme Court's statement (58 Ohio St. 2d at 371) is part of a straightforward description of the Equal Yield Formula and its intended operation.

Still focusing on the effects of the local property tax, Petitioners next apparently represent that the Supreme Court found as a fact that the Ohio school finance formula has achieved a perfect "equal revenue return for equal tax effort" effect (and they allege this was not found by the trial court). Petitioners' Brief, p. 11. Again, they are wrong.

What Petitioners refuse to recognize is that in this area there was no need to "contradict" trial court findings. The Ohio Supreme Court dealt with the issues under a "rational basis" standard and appropriately looked to legislative intent and the overall design of the challenged statutory provisions. The Ohio Supreme Court did recognize that the *goals* of the Ohio system are to assure wealth neutrality and equal return for equal effort, but that Court also explicitly noted that those goals had not yet been achieved. The Court stated:

> [D]isparity exists in per pupil expenditures throughout Ohio's school districts. This disparity exists because of differences in property wealth and the willingness or unwillingness of voters in a particular school district to pass operating levies. 58 Ohio St. 2d at 376 (Petitioners' App., p. 37a).

Contrary to Petitioners' representation, the Ohio Supreme Court accepted the trial court's general findings that the local property tax base still had some influence upon per pupil expenditures. From that factual basis, the trial court reached the *legal conclusion* that the system violated Ohio's equal protection clause. That *legal conclusion* was in error. It was properly reversed by the Ohio Supreme Court, which held as follows:

> While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. 58 Ohio St. 2d at 381 (Petitioners' App., p. 42a).

Accordingly, the Supreme Court did not disregard, ignore, or contradict any findings of fact in drawing its *legal conclusion* that the Ohio system has a rational basis and is therefore constitutional.

Finally, with respect to the equal protection holding, Petitioners insist that the Ohio Supreme Court's discussion of local control is in direct conflict with the findings of fact. Petitioners' Brief, pp. 12-13. They recite the trial court's conclusion that "the only *boards* of education in Ohio which have any degree of local control over educational decisions are those *boards* in a few well-financed school districts." (Emphasis added.) Then, they allege that this is irreconciliable with the statements of the Supreme Court regarding local control, such as:

> By local control, we mean not only *the freedom to devote more money to the education of one's children* but also control over and participation in the decision-making process as to how those local tax dollars are to be spent. 58 Ohio St. 2d at 377 (Petitioners' App., pp. 37a-38a) (emphasis added).
>
> In addition to allowing *people* within a school district to determine how much money they are willing to devote to education, local control al-

> lows for local participation in the decision-making process that determines how these local tax dollars will be spent. 58 Ohio St. 2d at 380 (Petitioners' App., p. 41a) (emphasis added).

The words and phrases emphasized above highlight Petitioners' attempted sleight of hand.

The trial court's purported finding with regard to local control reflects the Petitioners' mistaken notion that local control means that the local school board is where fiscal control must rest. The Ohio Supreme Court, however, correctly recognized that local control rests in the school district *residents* themselves, *i.e.,* the Court based its equal protection holding upon the fact that local control "allows the local *citizenry* to decide what type of education (beyond state required basics) is best suited for the children of their community." 58 Ohio St. 2d at 377 (Petitioners' App., p. 37a) (emphasis added).

In no way, then, are the Ohio Supreme Court's conclusions on local control inconsistent with the trial court's findings, because at no point did the trial court deny that the Ohio system allows local citizens the right to devote more money to the education of their own children by way of the locally voted property tax. The conclusions which the Ohio Supreme Court reached were ones dictated by the record, by the constitutional and legislative history of Ohio and, as pointed out by the Supreme Court, they are also supported by conventional wisdom concerning educational policy. 58 Ohio St. 2d at 380 (Petitioners' App., pp. 40a-41a). Further, those conclusions are consistent with the rationale and holding of *every* reported school finance case in this country. *See, e.g., San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); *Olsen v. State,* 554 P. 2d 139 (Ore. 1976); *Thompson v. Engelking,* 537 P. 2d 635 (Idaho 1975); *Serrano v. Priest,* 487 P. 2d 1241 (Calif. 1971).

2. *The "Thorough and Efficient" Facts*

Turning then to the Supreme Court's thorough and efficient clause holding, Petitioners complain because they feel the Supreme Court made findings of *fact* in conflict with the trial court's subjective *conclusions* on the "quality" of education in Ohio. Petitioners' Brief, pp. 15-17. Petitioners' contention here simply boils down to their philosophical disagreement with the Legislative and Executive Branches of Ohio Government as to what constitutes an "adequate" education. As the Ohio Supreme Court recognized, the State has seen to it that an adequate education is provided Ohio's children through the establishment of standards which define and require a "general education of high quality." *See* Ohio Rev. Code §3301.07(D).[3] Plaintiffs obviously believe those standards should be different, but as both the Court of Appeals and the Supreme Court recognized, it is within the constitutional prerogative of the Ohio Legislature to develop and prescribe the elements of an adequate education for Ohio's school children. And, again as recognized by the state appellate court and the Ohio Supreme Court, the Ohio General Assembly has fulfilled its constitutional duty in this area.

Finally, Petitioners allege that the Supreme Court found as a fact that school closings or calendar adjustments do not cause any educational harm (which they claim to be the case). Petitioners' Brief, p. 17. With regard to school closings, the Supreme Court merely stated:

> Although plaintiffs attempt to equate school closings with "educational deprivation," the uncontroverted fact is that school districts' calendar adjustments (school closings) have never resulted in any student receiving less than the full 182 days of instruction per year as required by R.C. 3313.48. 58 Ohio St. 2d at 388 (Petitioners' App., p. 49a).

The only factual statement found in this quote is that no child has ever received less than a complete school year of instruction as required by state law (182 days). Do Petitioners dispute this? Absolutely not; they freely admit it. Did the trial court find otherwise? No; it expressly found that the required 182 days have always been provided.

In the area of school closings, just as everywhere else, Petitioners have utterly failed to demonstrate any conflict between the Supreme Court's decision and the trial court's findings. They

3 Ohio Rev. Code §3301.07 reads in part: "In addition to the powers otherwise imposed on the state board under the provisions of law, such board shall have the following powers: ... (D) Formulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality."

cannot find even one instance where the Supreme Court relied upon a factual statement at odds with the trial court's findings. Thus, the supposed basis for their petition is non-existent.

C. PETITIONERS HAVE MISSTATED THE APPELLATE REVIEWING POWER OF THE OHIO SUPREME COURT

Even if one could accept the Petitioners' statements regarding contrary findings made by the Ohio Supreme Court as true, their arguments with respect to the proper reviewing power of the Ohio Supreme Court must fail. Petitioners' arguments as presented in their brief proceed on a somewhat simplistic, and erroneous, view of Ohio law. Their contention is that the Supreme Court of Ohio will *never* review the record evidence in cases before it and will *always* accept the factual findings made by the trial court unless there is *absolutely no evidence* to support those findings. Petitioners' Brief, pp. 6-7. Ohio law does not support their contention.

The reviewing power of the Supreme Court is linked to Ohio Rev. Code §2505.31, which reads as follows:

> In a civil case or proceeding, except when its jurisdiction is original, and except as provided by section 2309.59 of the Revised Code, the supreme court *need not determine* as to the weight of the evidence. (Emphasis added.)

This statute, by its terms, is discretionary, not mandatory, and merely relieves the Supreme Court of the obligation of reviewing the evidence in every case that comes before it; and that is precisely how the statute has been interpreted by the Ohio Supreme Court. In *City of Mentor v. Giordano,* 9 Ohio St. 2d 140 (1967), the Supreme Court stated as follows:

> It is well established in Ohio (1) that the Supreme Court is not required to and ordinarily will not weigh evidence, but it will examine the record to determine whether the evidence produced in a trial attains that degree of probative force and certainty which the particular case demands... 9 Ohio St. 2d at 144.

And in *Cincinnati Motor Transport Association v. Lincoln Heights,* 25 Ohio St. 2d 203 (1971), the Supreme Court, relying on *City of Mentor v. Giordano, supra,* expressly rejected the contention such as that made by Petitioners here that the Court could not review and weigh the evidence in a case before it. 25 Ohio St. 2d at 206.

Having stated that it will not "ordinarily" weigh the evidence in cases before it, the Ohio Supreme Court has gone on to describe two categories of situations in which it will more readily review the record evidence to determine the correctness of the factual findings. On the one hand, the Ohio Supreme Court has focused upon high burdens of proof as compelling the need for review of the evidence in a case. In *Cole v. McClure,* 88 Ohio St. 1 (1913), the Court stated as follows:

> While this court is not required to weigh the evidence in a case on error, and ordinarily will not do so, yet where relief is sought that can be afforded only upon clear and convincing proof, it will do so for the purpose of determining whether the proof was sufficient. 88 Ohio St. at 9.

After setting forth this general rule, the Court in *Cole v. McClure* then devoted nine pages to an examination of the record in that case to determine whether the evidence supported the factual findings. In *State v. Urbaytis,* 156 Ohio St. 271 (1951), the Court stated as follows:

> [W]here the law requires in the particular case a higher quality and quantity of evidence than is sufficient in ordinary cases to support a judgment by the preponderance of proof, this court will consider whether the evidence attains to that high degree of probative force and certainty. 156 Ohio St. at 278.

On the other hand, the Ohio Supreme Court has also noted that the gravity of the issues presented may lead the Court to detailed evidential review. In *McLaughlin v. Wheeling and Lake Erie Railway Company,* 61 Ohio St. 279 (1899), the Court noted:

> [C]ases may arise involving public considerations of so grave a character that it would be the duty of this court to consider and determine as to the weight of the evidence. 61 Ohio St. at 282.

In this case as it came to the Ohio Supreme Court there were a number of considerations that may well have led the Court to review the record and independently assess the accuracy of the findings. To begin with, there must have been initial inquiry respecting the trial court's wholesale adoption of the plaintiffs' (Petitioners') proposals—what other point is there for the Ohio Supreme Court to have noted the source of the findings and conclusions.[4] 58 Ohio St. 2d at 369 (Petitioners' App., p. 29a). Further, it would have been clear to the Ohio Supreme Court that the appellate court had virtually ignored all of the findings and conclusions in its reversal of the trial court's "thorough and efficient" holding. Beyond that, the facts were being hotly debated—both sides submitted substantially different portions of the record as supportive of their respective positions; and both sides submitted lengthy, detailed, but substantially different statements of fact. Of utmost importance, the defendants (Respondents) had pointed out to the Ohio Supreme Court that the trial court had rushed to the application of strict scrutiny without having first considered the extremely high burden which the Petitioners undertook as constitutional challengers to established legislation. As later noted by the Ohio Supreme Court, the Petitioners had to prove their case "beyond a reasonable doubt" (a fact which even the trial court had failed to recognize). 58 Ohio St. 2d at 376 (Petitioners' App., pp. 36a-37a). Also of critical importance, all of the above "signals" to the Ohio Supreme Court calling for review of the evidence were apparent in this case, which was presented as one of far reaching policy issues. The Court itself noted the gravity of the public considerations in its rejection of the trial court's strict scrutiny analysis:

4 The fact that the trial court's findings were a point touched upon by the lone dissenting Justice (58 Ohio St. 2d at 391) goes even further to demonstrate that the majority of the Court very consciously undertook its obligation to independently review the evidence rather than perform a rubber-stamp adoption of the plaintiffs' (Petitioners) proposals as did the trial court.

> [B]ecause this cause deals with difficult questions of local and statewide taxation, fiscal planning and education policy, we feel that this is an inappropriate cause in which to invoke "strict scrutiny." 58 Ohio St. 2d at 375 (Petitioners' App., p. 36a).

Accordingly, as this case came to the Ohio Supreme Court it was appropriately viewed as involving complex policy matters and deserving of the most diligent and detailed attention. The starting point for the Supreme Court can be understood as one of reviewing the facts but to only then conclude that, because the burden of proof was not met by the plaintiffs (Petitioners) and because the issues were appropriately viewed far differently than they were viewed by the trial court, the facts as found by the trial court could be ignored and discarded.

In seeking to avoid this conclusion, Petitioners rely upon the case of *Gillen-Crow Pharmacies, Inc. v. Mandzak,* 5 Ohio St. 2d 201 (1966). They attempt, however, to stretch that case beyond its true meaning. In that case, the Ohio Supreme Court stated as follows:

> This court is not required to and does not ordinarily weigh evidence, and a situation of the kind now before us comes within the rule that where similar factual findings are made by the Court of Common Pleas and the Court of Appeals on appeal they must be accepted by this court unless there is *no* evidence of probative value to support them. 5 Ohio St. 2d at 205.

Unlike the case at bar, *Gillen-Crow Pharmacies, Inc. v. Mandzak* did not involve any major public considerations. That case thus did not involve a situation where the Supreme Court will undertake to review and weigh the evidence.

More importantly, the factual findings in *Gillen-Crow Pharmacies, Inc. v. Mandzak* were ones reached first by the trial court and then by the Court of Appeals in an independent trial *de novo.*[5] This contrasts markedly with the procedure followed by the trial court and Court of Appeals in the instant case. The trial court itself did not undertake any independent analysis of the record but merely rubberstamped the 400 pages of proposed findings submitted by the Petitioners. That fact itself was recognized by the Supreme Court. 58 Ohio St. 2d at 369 (Petitioners' App., p. 29a). As to the Court of Appeals, that Court simply indicated that the record supported some, but not all, of the findings. In such a situation, the Supreme Court was virtually compelled to review the record evidence to determine whether or not that evidence was indeed sufficient to meet the high burden of proof required in this case. Certainly, the Supreme Court had the power to conduct such a review under Ohio law. There is nothing holy about the factual findings of Ohio trial courts that puts such findings beyond the reviewing power of the Ohio Supreme Court, and Petitioners err in suggesting otherwise.

If, as Petitioners contend, the Supreme Court did disregard certain factual findings of the trial court, we suggest the Court took such action only because the evidence was found wanting to support those findings - a conclusion that should not have been surprising, given the fact that the trial court itself failed to apply the proper evidentiary standard.

D. PETITIONERS' DUE PROCESS, ACCESS-TO-THE-COURTS, AND EQUAL PROTECTION ARGUMENTS ARE WITHOUT MERIT

As a general proposition, Respondents do not challenge the authorities cited by the Petitioners in their brief (pp. 18-22) for the fundamental concepts discussed therein. Respondents, however, do challenge the Petitioners as to their position that the applicable constitutional principles were violated below. The underlying facts, particularly as to the manner in which the Ohio

5 Prior to 1971, Ohio provided for appeals from courts of common pleas to courts of appeals on "questions of law" and on "questions of law and fact." As to the latter kind of appeal, the court of appeals would conduct a trial *de novo* and would not limit itself merely to reviewing the record as developed in the court of common pleas.

Supreme Court addressed the issues before it, show that the Petitioners received the fullest measure of due process through extensive and meaningful access to Ohio Courts. The issues they themselves had raised were dealt with fully and fairly.

Respondents respectfully submit that for the Petitioners to now claim that constitutional violations were occasioned or caused by the Ohio Supreme Court upon the basis that they, as litigants, were treated differently than "all [other] litigants in Ohio" is incredible—incredible to the point of demonstrating that Petitioners are capable of making any argument imaginable to keep this litigation pending in some form for their own non-substantive and political purposes.

The weakness and shallowness of Petitioners' claims are demonstrated not only by understanding the substance of the involved Ohio law and the fact that it has been cleverly misrepresented (as discussed *supra*) but also by an analysis of the authorities Petitioners rely upon. For example, they heavily rely upon *Cole v. Arkansas,* 333 U.S. 196 (1948) to bolster their proposition that they have a right to have their state constitutional challenge determined upon the findings made by the trial court as if they had been carved in granite. Not only is there no common sense in the notion of precluding all appellate review of the record in a case such as this one, the decision in the *Cole* case does not provide the support that Petitioners claim. *Cole* was a criminal case where the defendant was tried and found guilty of one statutory crime, but where, upon appeal, the conviction was affirmed for violation of a second and different statutory crime—a crime which had not been considered at the trial court level. The *Cole* case is one which turned upon the impropriety of the state's highest reviewing court deciding that case upon an issue which had never been litigated.

In this school finance case, nothing similar to the facts and circumstances of the *Cole* case is apparent. The Petitioners here were the plaintiffs below, and the constitutional issues which they raised were the very ones squarely dealt with by the Ohio Supreme Court in rejecting their challenge. The Petitioners have no basis to complain, and their petition should be dismissed.

III. CONCLUSION

The Petitioners initiated the litigation below in an Ohio trial court where they prevailed on their challenges. Not satisfied with just that, however, they filed a second lawsuit (encompassing the same claims) in federal court (Southern District of Ohio, Eastern Division; Case No. C-2-78-1004) during the Ohio appellate court's review of the trial court's decision. The federal court abstained upon being informed that, by then, the state case was next to be reviewed by the Ohio Supreme Court; and after the Ohio Supreme Court rejected Petitioners' challenges, so also did the federal court reject Petitioners' demands for more state money.

In the end, then, the Petitioners have been heard on their claims—in detail—at all levels within the Ohio judicial system and in federal court as well. They have sought out and received all of the process due them, and their positions and arguments have been thoroughly and fairly considered at all levels. Simply stated, Petitioners are hard pressed to now argue that their access to the courts was somehow restricted or limited. They have lost, that is all—but they refuse to accept it. As stated by Judge Hogan (on November 1, 1979) in the federal case: "The Cincinnati Board bows to no authority. ... [They consider themselves] above the law."

The weakness of the Petitioners' position can be measured by the absolute lack of any real demonstration in their Brief that they were at all harmed by alleged and misconceived improprieties in analysis or procedures as conducted by the Ohio Supreme Court. The pending Petition should be dismissed.

Respectfully submitted,

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